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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 7

JOHN JOSEPH KILLIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR RAYMOND DENNIS, *et al.*, *AMICI CURIAE*

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RAYMOND DENNIS, *et al.*, *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Raymond Dennis and others, appearing as *amici curiae* herein with the consent of both petitioner and respondent, are the defendant-appellants in *Dennis* v. *United States*, Nos. 6451 to 6459 in the United States Court of Appeals for the Tenth Circuit. In that proceeding, the defendants were convicted of conspiracy to defraud the United States by causing false non-Communist affidavits to be filed with the National Labor Relations Board. The trial court's charge to the jury with respect to membership in and affiliation with the Communist Party was in part identical with the comparable portion of the charge in the present case, the propriety of which is one of the questions for review under the writ of certiorari. On appeal, the *Dennis* defendants have challenged the charge, and accordingly they have a direct and substantial interest in the disposition of that question by this Court.

STATEMENT

Dennis and his co-defendants are officers and employees of the International Union of Mine, Mill and Smelter Workers, the principal union in the nonferrous metals mining industry. In November, 1956 they were indicted in the United States District Court for the District of Colorado under the general federal conspiracy statute (18 U. S. C. 371), for conspiracy to defraud the United States in obtaining a compliance status under Section 9 (h) of the Labor Management Relations Act (29 U. S. C. 159 (h))[1] by filing and causing the filing of false non-Communist affidavits.

Following denial of a motion to dismiss the indictment[2] and trial to a jury, the nine defendants who were convicted took the appeal which is now pending in the Court of Appeals for the Tenth Circuit. One of the grounds of appeal is the trial court's charge with respect to the meaning of "member of" and "affiliated with", as these expressions are used to define the relationship with the Communist Party affected by the Labor Management Relations Act.

The relevant portion of the charge in the *Dennis* case is set forth in Appendix B (*infra,* pp. 30-32). Like the charge in the present case,[3] it incorporates most of the indicia of Communist Party membership in Section 5 of

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[1]Section 9 (h) was repealed by Section 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, P. L. 86-257, 73 Stat. 519.

[2]Defendants challenged the indictment on the ground, *inter alia,* that it failed to state an offense because the conspiracy charge involved no essential element of fraud. *Cf. Bridges* v. *United States,* 346 U. S. 209. The motion was denied, *United States* v. *Pezzatti,* 160 F. Supp. 787, and that ruling is also challenged on appeal.

[3]The charge in the present case is set forth in the petition for certiorari, at pp. 57-60.

the Communist Control Act of 1954, 50 U. S. C. 844.[4] Concededly, that statute envisages that juries shall consider these indicia (insofar as the evidence establishes the indicial facts) in determining issues of Communist Party membership or affiliation, but their use raises serious constitional questions under the First and Fifth Amendments.[5]

QUESTION PRESENTED HEREIN

This Court limited its grant of certiorari (365 U. S. 810) to two of the questions presented by the petition. This brief is concerned only with the first question, as follows:

> "Whether instructions to the jury properly defined membership in and affiliation to the Communist Party."

SUMMARY OF ARGUMENT

I. *Section 5 of the Communist Control Act of 1954 (50 U. S. C. 844), at least in part, is unconstitutional on its face.* The section provides (Appendix A, *infra* pp. 28-29) that evidence of any of the numerous actions by a defendant described therein shall constitute evidence of membership in the Communist Party. Accordingly, Section 5 falls within the long-established rule that statutes prescribing evidentiary rules of this type are valid under the due process clause only if there is reasonable basis for the statutory inference. *Tot* v. *United States,* 319 U. S. 463. The indicia of membership listed in Section 5 are too broadly

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[4]At the *Dennis* trial, the defense objected to the charge on membership and affiliation, including specifically the paragraph incorporating the Communist Control Act indicia.

[5]Such questions were presented in *Travis* v. *United States,* 364 U. S. 631, but the opinion and judgment of this Court did not reach them.

and vaguely worded to survive this test, and several of them —notably clauses (5), (6), (9), (11), (12) and (13)— embrace conduct which is patently unrelated to the determination of Communist Party membership. Section 5 also violates the First Amendment guarantees of free speech, press and assembly, for it subjects the exercise of these rights to the hazard of criminal prosecution and possible conviction under unreasonable and arbitrary evidentiary standards.

II. *Whether or not unconstitutional on its face, Section 5 of the Communist Control Act is unconstitutional as applied in this case.* The trial judge incorporated nine of the statutory indicia, virtually verbatim, in his charge to the jury on the ultimate issue of membership. These included clauses (5), (6), (11), (12), and (13) of Section 5, comprising the vaguest and most sweeping portions of the statute, remote from the ultimate issue of membership to be determined by the jury. Such a parroting of the statutory indicia in this case (and others where membership is an issue) is erroneous and highly prejudicial, and deprived petitioner of a fair trial. The omission of particular criteria, without comment on the corresponding lack of evidence, is likewise unfair, and an unconstitutional application of the statute resulted.

ARGUMENT

The ultimate issue of fact for the jury in this case was whether or not the defendant was a member of the Communist Party at the time he signed an affidavit to the contrary. The *Dennis* case presented the same issue.[6] In both

[6]Since the indictment in the *Dennis* case charges a conspiracy, the ultimate issue was whether or not the evidence established an agreement to file and cause the filing of false affidavits.

cases the trial judge, over objection, incorporated a large part[7] of Section 5 in his charge, to guide the jury in determining the ultimate question. In both cases the charge included portions of Section 5 which make it, in whole or in part, unconstitutional on its face. In neither case did the trial judge modify the language or confine the application of Section 5 in such a way as to avoid consequences both unfair and prejudicial to the accused.

I. IN WHOLE OR IN PART, SECTION 5 OF THE COMMUNIST CONTROL ACT OF 1954 IS UNCONSTITUTIONAL ON ITS FACE.

At least twice before, this Court has heard argument touching the constitutionality of Section 5 of the Communist Control Act. Most recently, the issue arose in the context of the registration provisions of the Internal Security Act of 1950 (50 U. S. C. 781 *et seq.*), in *Communist Party* v. *Subversive Activities Control Board*, —— U. S. —— (June 5, 1961). However, neither in that case nor the *Travis* case, *supra*, did the Court reach the problem, and in neither case was the nature and background of Section 5, as a statutory rule of evidence, fully explored.

A. *Legislative Background of Section 5.* This provision owes its origin to the dissatisfaction, entertained in certain quarters in 1954, with the practical results of the Smith Act (18 U. S. C. 2385) and the Internal Security Act of 1950. Under the former, the prosecution was obliged at each trial to offer voluminous and time-consuming evidence that the Communist Party is an organization that advocates

[7]Comparison of the two charges shows that in the *Dennis* case the trial court omitted the first two clauses of Section 5 and incorporated the other twelve verbatim, while in the present case the court omitted clauses (1), (9) and (10) of Section 5, modified clause (2) substantially and several others very slightly, and added a clause on recruiting which has no counterpart in Section 5.

overthrow of the government by force and violence. Under the latter, the Communist Party had not been finally determined to be a "Communist-action" organization, despite the elapse of four years since passage of the Act.

In the spring of 1954 a number of bills were introduced in Congress, the purpose of which was to make a legislative finding that the Communist Party is a violence-advocating organization, to "outlaw" it, and make knowing membership in the Party a criminal offense.[8] Some twenty such bills introduced in the House of Representatives were the subject of hearings conducted in the spring of 1954 by a subcommittee of the House Committee on the Judiciary.[9] Among these were H. R. 8912 (introduced by Representative Martin Dies of Texas) and H. R. 9502, each of which contained a section virtually identical with Section 5 of the Communist Control Act as ultimately enacted.[10]

At the hearings, Justice Michael A. Musmanno of the Supreme Court of Pennsylvania emerged as the draftsman of and principal witness for H. R. 8912.[11] Most of the

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[8]Sponsors of these bills were doubtful that such membership was punishable under the membership clause of the Smith Act, in view of the provisions of Section 4 (f) of the Internal Security Act. See footnote 9, *infra* and *cf. Scales* v. *United States*, —— U. S. —— (June 5, 1961).

[9]Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives (83d Cong., 2nd sess.)—Serial No. 14 "Internal Security Legislation", hereinafter cited as "Hearings". The Chairman of the Subcommittee was Representative Louis E. Graham of Pennsylvania.

[10]H. R. 8912 and H. R. 9502 are set forth in Hearings, at pp. 169-70 and 211-12. Neither contained the phrase "or knowledge of the purpose or objective of such party or organization", and both contained a clause (15) defining the word "organization" which, in drastically modified form, finds counterpart in Section 4 (b) of the Communist Control Act, 50 U. S. C. 843 (b).

[11]Justice Musmanno made four appearances before the Subcommittee (Hearings, *passim*) and on two occasions in the House Representative the language of the bill was attributed to Justice Musmanno. 100 Cong. Rec. 14652 and 14849.

testimony and colloquy related to the legislative findings and the "outlawing" provisions, and there was scant reference to the portion (Section 4) of H. R. 8912 containing the language now in Section 5 of the Act. The general purpose to deal with cases of concealed membership is clear on the face of this provision, and Justice Musmanno's testimony adds nothing more.[12]

The Department of Justice, dubious of the constitutionality of the "legislative finding" of the Communist Party's unlawful nature and worried about the effect of the proposed legislation on enforcement of the Internal Security Act, opposed H. R. 8912 and the comparable bills.[13] Likewise critical was a member of the subcommittee, Representative Francis E. Walter of Pennsylvania, with whom Justice Musmanno was frequently involved in argument, which at one point touched on Section 4 of H. R. 8912.[14]

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[12]In a report submitted to the Committee May 24, 1954 (Hearings, pp. 123-31) Justice Musmanno commented on a number of the bills before the Subcommittee, and in particular on H. R. 8912 (Hearings, p. 131):

> "The only bill before this Committee which, in my judgment definitely, conclusively, and unequivocally puts the Communist Party of the United States out of business, and does it constitutionally, is H. R. 8912 . . .
>
> "The bill then specifically penalizes membership in these illegal organizations. Membership is not left to guesswork or conjecture. It is spelled out in such a manner that it blocks every possible subterfuge that a member of the party might present in the endeavor to conceal his membership."

[13]Hearings, *passim*.

[14]Hearings, p. 257:

> "Mr. Musmanno. If you . . . do not indicate what are the features of evidence which would be used to establish membership, all a member of the Communist Party needs to do is say, 'I resign,' and then you couldn't prosecute him because you must have some standards of evidence.
>
> "Mr. Walter. . . . you are just as wrong as you could be. When a man is indicted for being a member of the Communist Party on June 1, if he resigns the day it is filed, of course, he is guilty."

None of the bills considered by the Subcommittee was acted on in Congress, but much of the language of H. R. 8912 became part of the Communist Control Act by way of floor amendments to other legislation, as hereinafter described.

At this time, the Senate had under consideration S. 3706 (the "Butler" bill), containing those parts of the Communist Control Act which amended the Internal Security Act by adding the provisions relating to "Communist-infiltrated" organizations.[15] In the Senate, Senator Hubert Humphrey of Minnesota proposed an amendment in the nature of a substitute, containing provisions (a Congressional "finding" and a penal proscription of membership) very like those of Representative Dies' H. R. 8912, but *not* including the evidentiary "indicia" of membership. The sponsor of S. 3706, Senator Butler of Maryland, and other Senators influential in the field of internal security,[16] opposed the Humphrey amendment on the ground that it would jeopardize enforcement of the Smith and Internal Security Acts.[17] The Senate nevertheless adopted the Humphrey amendment, but as an addition to rather than a substitute

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[15]Section 10 of the Communist Control Act, which added to the Internal Security Act Section 13A. 50 U. S. C. 792a.

[16]Among others Senators William F. Knowland of California, William Jenner of Indiana and Joseph R. McCarthy of Wisconsin.

[17]100 Cong. Rec. 14211. Senator Butler also opposed the bill on the ground that "there is no way of knowing who is a member of the Communist Party." *Id.* at 14211. Apparently in consequence of this and other discussion of the difficulty of establishing membership, Senator Homer Ferguson offered an amendment to the Humphrey amendment providing that: "For the purposes of this act in determining whether or not a person is a member . . . the court may take into consideration the connection of such person with such organization as evidenced by his adherence to the discipline of the organization, his acceptance of the purposes of the organization and other incidents of affiliation with the organization with knowledge of such purposes." With Senator Humphrey's approval, the amendment was adopted by unanimous consent and without discussion. 100 Cong. Rec. 14230. This provision was eliminated by Representative Graham's amendment in the House. 100 Cong. Rec. 14639.

for the Butler bill, and in this form S. 3706 was passed and sent to the House, entitled the "Communist Control Act of 1954".[18]

In the House, S. 3706 was called up for debate with an amendment offered by Representative Graham which eliminated the criminal proscription of membership and substituted a provision (also derived from H. R. 8912) depriving the Communist Party of its "rights, *privileges and* immunities".[19] During the discussion, Representative Dies criticized the omission of both the proscription of membership and the evidentiary standards that had been part of H. R. 8912,[20] but the House passed the bill without further amendment and sent it back to the Senate.

There, Senator Humphrey moved to amend the bill by restoring the criminal proscription of Party membership, and adding a section (derived from Section 4 of H. R. 8912) embodying thirteen evidentiary standards of membership. Explaining the latter, Senator Humphrey declared:[21]

> "The purpose of the new section which I propose to add . . . is to establish certain criteria by which the

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[18]100 Cong. Rec. 14234.

[19]100 Cong. Rec. 14639. *Cf. Communist Party* v. *Catherwood*, —— U. S. —— (June 12, 1961).

[20]100 Cong. Rec. 14652: "Mr. Dies. Section 3 of the House bill [the "privileges and immunities" section] was taken from H. R. 8912, a bill which I introduced . . . and which was written largely by Justice Musmanno . . . Under my bill . . . you provide that anyone who becomes a member of the Communist Party would be guilty of a crime. You define 15 factual situations that constitute membership [referring to the "indicia" of membership language of H. R. 8912] . . . Those who put this bill together left out section 3 [the proscription of membership section] of my bill. They simply put in section 2 ["privileges and immunities"]. So while you are outlawing the Communist Party . . . yet the bill does not contain adequate enforcement provisions. I am hoping that when the conferees meet they will call Justice Musmanno before the committee and get him to help them write a more workable bill."

[21]100 Cong. Rec. 14722.

> court can hear evidence so as to determine effective membership, because obviously one of the most difficult jobs of the court and of the prosecutor is to determine what constitutes membership, and to be able really to pinpoint the fact of participating membership in the Communist conspiracy.
>
> "I have listed 14 criteria. I wish to make it clear that they are not exclusive. They are criteria, however, which the court shall instruct the jury to consider, in its deliberations upon the evidence, as being relevant to the ascertainment or establishment of membership."

There was sharp debate between the proponents of the Humphrey amendment and those who feared that the proscription of membership would interfere with registration proceedings under the Internal Security Act,[22] but no other significant comment on the evidentiary criteria.[23] The Humphrey amendment was approved by a vote of 41 to 39; in conference it was changed so as to subject Communist Party members to the disabilities of members of "Communist-action" organizations as defined in the Internal Security Act, and by adding the words "or knowledge of the purpose or objective of such party or organization" to the evidentiary criteria section,[24] and in that form was enacted into law as the Communist Control Act of 1954,[25] in which

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[22]100 Cong. Rec. 14211-12, 14222, and 14722-25.

[23]Speaking for the Humphrey amendment, Senator Clinton Anderson of New Mexico reported that "This morning I talked with Martin Dies . . . He says we must use the 15 tests he has outlined, and the Senator from Minnesota has therefore included them in his amendment to the bill." 100 Cong. Rec. 14724.

[24]100 Cong. Rec. 15101.

[25]The House had instructed its conference managers to agree to the changes made in the Senate. 100 Cong. Rec. 14849. Discussing the bill as amended by the Senate, Representative Dies said: "It defines membership by setting forth fifteen different factual situations that constitute membership." Representative Feighan of Ohio also referred to the provision as one "which defines membership . . ." 100 Cong. Rec. 14849.

Section 5 embodies the evidentiary criteria that had originated with Representative Dies and Justice Musmanno in H. R. 8912.

B. *Construction of Section 5.* From the foregoing account it appears that—

1) The general purpose of Section 5 is to facilitate the prosecution, under applicable statutes, of persons accused of membership in the Communist Party who deny their membership (or "participation" or "knowledge");

2) The specific purpose of the statute is to establish an evidentiary rule, that evidence of any of the facts and circumstances described in Section 5 shall constitute evidence of membership (or "participation" or "knowledge"); and

3) Congress did not consider or express the precise nature of the statutory inference or the manner by which it should be given effect, other than that it should be put to the jury "under instructions from the court", which of course would have been the case even in the absence of that phrase.

Section 5 is virtually *sui generis*. A reasonably thorough canvass of the laws of the fifty states has revealed no recognizable statutory antecedent.[26] Nor has its example proved

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[26] The survey was confined to legislation dealing with Communism and other forms of political subversion such as criminal syndicalism, loyalty, and the general field of internal security. Only three statutes were found which prescribe evidentiary indicia of membership or anything comparable. A 1958 Louisiana statute prohibiting the affiliation of certain non-trading corporations with foreign corporations "any of the officers or members of the board of directors of which are members of Communist . . . organizations" provides that: "Reports or information from the files of the Committee on un-American Activities of the U. S. House of Representatives shall constitute prima facie evidence of such membership in said organizations." La. Rev. Stat. (West's Supp. 1960) sec. 14:385. A 1952 Michigan statute prohibiting "communists" from holding certain state office provides that, in certain administrative proceedings, the ". . . refusal of any per-

attractive, for only one state has adopted such a law since Section 5 was enacted.[27] Indeed, the only closely related prior enactment in any jurisdiction[28] is the Union of South Africa's Suppression of Communism Act, 1950, which provides:[29]

> "12.(1) If in any prosecution under this Act, or in any civil proceedings arising from the application of the provisions of this Act, in which it is alleged that any person is or was a member or active supporter of any organization, it is proved that he attended any meeting of that organization, or has advocated, advised, defended or encouraged the promotion of its purposes, or has distributed or assisted in the distribution of or caused to be distributed any periodical or other publication or document issued by, on behalf of or at the instance of that organization, he shall be presumed, until the contrary is proved, to be or to have been a member or active supporter, as the case may be, of that organization."

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son . . . upon being called before a duly-authorized tribunal or in an investigation under authority of law, to testify concerning his being a Communist or a member of a Communist-front organization on the ground that his answers might tend to incriminate him, shall be . . . prima facie evidence that such a person is a Communist or a knowing member of a communist-front organization." Mich. Stats. Ann. (Callahan) Supp. 1959 sec. 28.243(18).

[27]The New Hampshire Subversive Activities Act (*cf. Uphaus* v. *Wyman*, 364 U. S. 388) was amended in 1955 by the addition of Section 3-a, identical with Section 5 of the Communist Control Act, except that it refers to members of a "subversive organization" or "foreign subversive organization" as defined in that Act. N. H. Rev. Stat. Ann. (1955) 588:3-a, added by Laws 1955, 188:1.

[28]Counsel's survey of foreign legislation is admittedly sketchy.

[29]Suppression of Communism Act, 1950 (Act No. 44 of 1950) Section 12.(1), as amended by Suppression of Communism Amendment Act, 1951. The latter statute deleted the word "publicly" before the word "advocated" in the text above. No decisions construing this provision were found. The Act declares the Communist Party to be an "unlawful organization", and empowers the Governor-General to declare any other Communist organization unlawful. Under the Unlawful Organizations Act, 1960, the Pan Africanist Congress and the African National Congress were temporarily declared to be unlawful organizations. *South Africa and the Rule of Law* (International Commission of Jurists, Geneva 1960), pp. 49-52 and 70-75.

There are, to be sure, a number of statutes directed at subversive organizations which extend the penal or other consequences beyond membership to supporting conduct of various types, some of which resemble some of the indicia in Section 5.[30] These, however, are not evidentiary provisions like Section 5, but rather are declarations of substantive law, based on acts such as attending meetings, paying dues or otherwise contributing financially, recruiting members, or distributing literature.[31]

In the evidentiary field, it is not uncommon for a legislature to lay down guides or standards to assist an administrative body in applying a more general "ultimate standard". There are several well-known federal examples,[32] including the Internal Security Act, Sections 13 (e) and (f) and 13A (e) of which contain an enumeration of factors to guide the Subversive Activities Control Board in determining whether or not an organization is "Communist-action", "Communist-front", or "Communist-infiltrated" in charac-

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[30]See, e.g., Miss. Code Ann. (1942), Sec. 4194-07; Okla. Stats. Ann. tit. 21, sec. 1266.4(4); N. J. Stats. Ann. sec. 2A: 148; Tex. Rev. Civ. Stats. Ann. (Vernon's 1960), art. 6889-3A; Iowa Code Ann. sec. 689.9; South Dakota Code (1939) sec. 13.0801; Mont. Rev. Code Ann. (1947) secs. 94-4406 and 94-4427.

[31]South Africa's Suppression of Communism Act, sec. 1. (1) (iii) goes even further in providing that its sanctions shall apply not only to anyone "who professes . . . to be a communist", but also to anyone "who, after having been given a reasonable opportunity of making such representations as he may consider necessary, is deemed by the Governor-General . . . to be a communist on the ground that he . . . advocated, advised, defended or encouraged the achievement of any of the objects of communism . . ."

[32]E.g. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (Fair Labor Standards Act of 1938); *Yakus* v. *United States*, 321 U. S. 414 (Office of Price Administration); *Mulford* v. *Smith*, 307 U. S. 38 (Agricultural Adjustment Act of 1938); *Hampton & Co.* v. *United States*, 276 U. S. 394 (tariffs).

ter.[33] But the criteria of Section 5 are not intended for use in drawing the boundaries of a statutory concept, but for the far different purpose of aiding a jury to determine a circumstance thought to be within the bounds of ordinary human observation—to wit "membership".

The most common type of legislatively-prescribed rule of evidence is that in which proof of a specified fact is made to give rise to an inference of another fact. While there are many variants, most of these statutes fall in one of two categories. In one, proof of possession of an article—commonly a weapon or a narcotic drug—raises an inference that the possession is criminal or unlawful.[34] In the other, proof of an act or "occurrence" raises an inference that the act was criminal or tortious.[35]

Only a few such statutes have been enacted in the loyalty-security field.[36] Nevertheless, it is clear that Section 5 of the

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[33]The standards in Section 13 (e) applicable to "Communist-action" organizations were upheld in *Communist Party* v. *Subversive Activities Control Board, supra.* Some of the standards in Sections 13 (f) and 13A (e)—notably item (3) in each—are much vaguer, and subject to the vices that afflict the criteria in Section 5 of the Communist Control Act.

[34]E.g. *Tot* v. *United States,* 319 U. S. 463 (possession of firearms by a convict or fugitive from justice raises presumption of transportation in interstate commerce); *Casey* v. *United States,* 276 U. S. 413 (possession of unstamped morphine raises presumption of criminality); *Adams* v. *New York,* 192 U. S. 585 (possession of policy slips raises presumption of knowing use for gambling).

[35]*Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35 (proof of injury inflicted by a railroad is prima facie evidence of railroad's negligence); *Manley* v. *Georgia,* 279 U. S. 1 (bank insolvencies presumed fraudulent); *Pollock* v. *Williams,* 322 U. S. 4 failure to complete work contract prima facie evidence of fraud); *McFarland v. American Sugar Co.,* 241 U. S. 79 (paying less for sugar in Louisiana than elsewhere presumptive evidence of monopoly); *Hawes* v. *Georgia,* 258 U. S. 1 (moonshining apparatus on premises).

[36]In addition to the statutes cited *supra* p. 11 note 26 see *Adler* v. *Board of Education,* 342 U. S. 485 (membership in "listed" organization with knowledge of unlawful purpose "prima facie evidence of disqualification" for teaching); Iowa Code Ann. sec. 689.6 (display of red flag is presumptive evidence of intent thereby to advocate anarchy or treason).

Communist Control Act—although it differs radically in other respects from these statutes—falls in the second category, inasmuch as evidence of any of the numerous acts or circumstances itemized therein is declared to be evidence of the ultimate fact of membership.

Among these evidentiary statutes, the legal nature and "weight" of the prescribed inference vary greatly.[37] Under some statutes the prescribed inference has "weight" only if uncontroverted, and vanishes as soon as contrary evidence is received.[38] Other statutes have been construed to give the inference evidentiary "weight" to be balanced against contrary evidence, and statutes of this type may[39] or may not[40] also shift the burden of proof to the defendant.

The language of Section 5 does not resemble that of other evidentiary statutes and, as already shown, Congress gave no consideration to these matters. Both the language and the purpose of the section make it quite clear, however, that the inference of membership, arising from evidence of the listed circumstances, has evidentiary weight which does not vanish in the face of contrary evidence, but which

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[37]Legislated evidentiary presumptions have been much discussed in legal literature. See, e.g., Wigmore, *Evidence* (3rd ed., 1940); secs. 1356 and 2491; Morgan, *Some Observations concerning Presumptions*, 44 Harv. L. Rev. 906 (1931); Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 Harv L. Rev. 59 (1933); Comment 30 Mich. L. Rev. 600 (1932); 51 A. L. R. 1139.

[38]E. g. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43; *Casey* v. *United States*, 276 U. S. 413. Wigmore (sec. 2491) does not recognize such statutes as creating "true" presumptions, and treats them as mere regulations of evidentiary procedure.

[39]*Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639; *Manley* v. *Georgia*, 279 U. S. 1; *James-Dickinson Co.* v. *Harry*, 273 U. S. 119; *Hawes* v. *Georgia*, 258 U. S. 1

[40]E. g. *People* v. *Cannon*, 139 N. Y. 32, 34 N. E. 759 (1893).

persists and is to be weighed by the jury against whatever contrary evidence there may be.

The statutory directive that in determining membership "the jury . . . shall consider evidence, if presented, as to" the 13 listed indicia, strongly indicates that the criteria are to have lasting evidentiary weight. Nor is any other conclusion compatible with the law's purpose to deal with concealed membership,[41] for if the inference of membership were to disappear upon the introduction of contrary testimony, the indicia would then have no effect at a trial in which the defendant offers any evidence controverting the charge of membership.[42]

C. *Unconstitutionality of Section 5 under the Due Process Clause.* It is well-established[43] that a legislature cannot constitutionally enact a rule of evidentiary inference or presumption unless there is a rational relation between the fact proven and the fact inferred. In this Court, the rule was enunciated half a century ago by Mr. Justice Lurton, declaring for a unanimous bench in the *Turnipseed* case (219 U. S. at 43) that it is ". . . essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

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[41] *Supra*, pp. 7-11 and notes 12 and 20.

[42] Senator Humphrey's statement (*supra* pp. 9-10) in the Senate, as sponsor of the amendment containing Section 5, also supports the conclusion that the indicia are to be given lasting evidentiary weight.

[43] Despite the contrary view of Dean Wigmore, *op. cit. supra* sec. 1356: "If the legislature can make a rule of evidence at all, it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic truth." This appears to ignore the distinction between what is unwise or foolish, and what is irrational and arbitrary.

Variously phrased, this principle has been repeatedly stated and applied, and both state[44] and federal[45] statutes have been held invalid under the due process clause where the connection between the fact proved and the fact inferred was deemed insufficient.[46] Section 5 does not satisfy this test.

Evidentiary statutes heretofore reviewed in the courts have specified proof of a single element of the action (*e. g.* a railway accident, possession of a weapon, or a bank insolvency) as the basis for inferring an additional essential element. But Section 5 is wholly unlike these, for it specifies not one, nor 13, but at least 57 various acts and circumstances[47]—none of which is an essential element of the offense—as constituting evidence of the ultimate fact of membership. Furthermore, Section 5 places no temporal limit on the evidentiary inference it establishes; acts and circumstances described in these categories raise the inference of membership no matter how long before the indictment (or the time of the membership charged) they occurred.

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[44]*Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639; *Manley* v. *Georgia*, 279 U. S. 1; *McFarland* v. *American Sugar Co.*, 241 U. S. 79; *Government of Virgin Islands* v. *Torres*, 161 F. Supp. 699 (D. V. I.); *Great Atlantic & Pacific Tea Co.* v. *Ervin*, 23 F. Supp. 70 (D. Minn.); *United States* v. *Warden of Clinton Prison*, 29 F. Supp. 486 (N. D. N. Y.); *In re Opinion of Justices*, 208 Mass. 619, 94 N. E. 1044 (1911).

[45]*Tot* v. *United States*, 319 U. S. 463; *Bollenbach* v. *United States*, 326 U. S. 607; see *Morrissette* v. *United States*, 342 U. S. 246, 275.

[46]It appears that the Court applies a stricter standard of rationality under statutes which, like Section 5, give the inference lasting evidentiary weight, than under those creating only an initial presumption which disappears when contrary evidence is introduced. Compare the *Turnipseed* case, *supra* (upholding the latter type) with the *Western & Atlantic* case, *supra* (invalidating the former type).

[47]The language of Section 5 is so diffuse and general that it is impossible to determine how many individual indicia of membership are comprised within the thirteen descriptive clauses, but tabulation on any basis will yield at least 57 varieties of inference.

Then, too, the components of the thirteen indicial clauses are made equally applicable to support the inferences of membership, participation, or knowledge of organizational purposes. Yet these three concepts are quite distinct each from the others, and there appears to be no rational basis for directing that three such different inferences be drawn from the same set of evidentiary criteria.

But the deeper vice of Section 5 lies in the lack of any reasonable connection between many of the items listed therein and the inference to be drawn therefrom. What basis is there for inferring that a person who has made a loan to the organization (clause (2)), perhaps secured by real estate, or who is "called upon for services" (clause (7)) which might even be legal or medical, is a member of the organization or knows its purposes? Even more remote from probability are clauses (9), (11), (12), and (13) of Section 5, all of which cover action taken independently of the organization, if such acts are in line with any of the "plans, designs, objectives, or purposes of the organization".[48]

The remote and irrational nature of these criteria was noted during the hearings on H. R. 8912 not only in the

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[48]It cannot be contended that the "plans, designs, objectives or purposes" of the organization covered by Section 5 are limited to the particular "purposes or objectives" to bring about overthrow of the government by force or violence as specified in Section 4 of the Act. Section 5 is clearly intended to be comprehensive and general, as witness the phrases "orders, plans, or directives of any kind of the organization" in clause (4) and "any plan or enterprise of the organization" in clause (6). Furthermore, if such a limiting construction were to be placed on Section 5 the judgment here would have to be reversed, inasmuch as no such restriction was expressed in the charge to the jury. Note also the result such a limiting construction would have under the phrase "if presented" in the introductory paragraph of Section 5.

press[49] but also by Representative Francis E. Walter, a member of the subcommittee[50]:

> "Mr. Walter. Here is the thing that disturbs all of us as former practitioners. Look at this language . . . of the bill that you are discussing. . .
> " 'Has made financial contribution to the organization in dues, assessments, loans, or in any other form'—
> "then followed by this—
> " 'Has made himself subject to the discipline of the organization in any form whatsoever.'
> "I am quite certain you will agree with me that those two provisions are susceptible of very strange interpretation. If I should make a contribution to the Anti-Nazi League that would make me guilty under the terms of this law. Or if I should advocate public housing—which is the Communist Party line at this moment—that would make me guilty under this bill. The guilt is not related to the fact that the group is trying to overthrow the government of the United States, but only to the activities I have enumerated.
> "Mr. Hyde. They are not only advocating public housing but graduated income tax.
> "Mr. Walter. You will find that lawyers just do not quite agree that that is the proper approach . . ."

The defects noted by the Congressman are patent on the face of Section 5. It is common knowledge that the Communist Party not only advocates public housing but

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[49]100 Cong. Rec. 15110-11. *The Wall Street Journal* said: "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper." The *Newark Star Ledger* said: "Such a law might be used to herd into prison thousands of persons who have never been Communists and who have no basic sympathy with the Communist conspiracy."

[50]Hearings at p. 183, during the testimony of Wayne E. Richards, Commander-in-Chief of the Veterans of Foreign Wars.

also racial integration, the Stockholm peace appeal, and numerous social aims many of which are supported by people who are strongly anti-Communist. Yet under these clauses of Section 5, it is evidence of Communist Party membership to write, speak, or act in any other way in favor of these goals, if they are also goals of the Party.

Finally, and in addition to their remoteness from the fact inferred, the criteria of Section 5 are cast in such vague and general terms that they cannot be fairly used by jurors as guides. Other evidentiary statutes designate with precision the proven fact from which the inference is to be drawn. Section 5, however, directs that the inference of membership may be drawn not only from the particulars specified therein, but also from any fact or circumstance reached by catch-all expressions—"any other form" of financial contribution (2), discipline "in any form whatsoever" (3), directives "of any kind" (4), "in any other capacity" (5), "any plan or enterprise" (6), "any other form of communication" (8), "any other type of publication" (9), "in any other way" sent "material or propaganda of any kind" (10), "or to any one else" (11), "in any other way" and "in any manner and to any degree" (12), and "in any other way participated" (13). Obviously, there can be no rational basis for inferring membership from unspecified facts.

For all these reasons, Section 5 "offends reason" and cannot be regarded as "a fair summary of experience". See *Bollenbach* v. *United States*, 326 U. S. 607, 611. It is far more arbitrary and unreasonable than the statutes invalidated in the *Tot, Western & Atlantic, Manley, McFarland,* and other such cases, all *supra* pp. 16-17. As Justice Jackson wrote for the Court in *Morissette* v. *United States*, 342 U. S. 246, 275:

> "A presumption which would permit but not require the jury to assume intent from an isolated fact would

> prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect . . . Even Congressional power to facilitate convictions by substituting presumptions for proof is not without limit. *Tot* v. *United States,* 319 U. S. 463."

In the case of Section 5, and in their zeal to ferret out "every possible subterfuge",[51] Representative Dies and Justice Musmanno lost touch with reality and framed an evidentiary statute which, on its face, is incompatible with due process of law.

D. *Unconstitutionality of Section 5 under the First Amendment.* Evidentiary statutes relating to railway accidents, firearms, and bank insolvencies may or may not be unreasonable in terms of due process, but do not infringe on the First Amendment. Section 5, however, embodies standards which violate not only that clause, but the First Amendment as well. Their impact on freedom of speech, press and assembly is direct, for clauses (6), (8), (9), (10), (11), and (12) expressly deal with conferring, communicating, meeting, writing, speaking and disseminating literature.

In *De Jonge* v. *Oregon,* 299 U. S. 353, is was held that lawful exercise of the First Amendment freedoms may not constitutionally be penalized merely because the auspices are those of a subversive organization. *A fortiori* Section 5 is invalid, for it reaches not only speech or writing under the auspices of the Communist Party, but also any speech or other conduct which supports an objective also favored by the Party. Thus it embraces mere parallelism, and applies

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[51] *Supra,* p. 7.

even if there is no contact between the Party and an accused person acting entirely independently, or even competitively.

It is no answer to say that Section 5 is not a penal statute, or that the criteria it embodies are not absolute tests. The inescapable fact is that it directs judges to instruct juries that speech or writing, uttered or distributed quite independently of the Communist Party (or other organization), shall be considered as evidence of membership in the organization if it is "in behalf of the objectives" of the organization. The statutory mandate is hopelessly vague and unreasonable, and its acceptance as a standard of proof would be gravely detrimental to our judicial practice.

II. WHETHER OR NOT UNCONSTITUTIONAL ON ITS FACE, SECTION 5 OF THE COMMUNIST CONTROL ACT IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

Irrespective of the constitutional validity of Section 5 on its face, it has not been constitutionally applied in either the present case or the *Dennis* case. Assuming that constitutionality can somehow be salvaged, this could only be accomplished by a very flexible construction of the statute, and careful framing of the court's instructions to the jury insofar as they relate to the evidentiary indicia of membership.

Supporting the constitutionality of Section 5 in *Communist Party* v. *Subversive Activities Control Board, supra*, the government referred[52] to the provision that the jury's consideration of the evidence described in Section 5 should be "under instructions from the court", and then remarked: "It is to be presumed that the court's guidance of the jury in its consideration of said evidence will be an intelligent guidance." But experience to date has not borne out the

[52]Brief for the Respondent in No. 12 (October Term, 1960) p. 167.

government's presumption, for the federal district courts have tended rather to apply Section 5 in a rigid fashion, reading its provisions very literally and embodying its language parrot-like in their instructions to juries.[53] As in the present case, the trial courts have simply eliminated those clauses of Section 5 to which no evidence in the record corresponded (relying, no doubt, on the phrase "if present" in Section 5), and have incorporated the remaining clauses, regardless of the nature of the evidence, in the charge virtually verbatim. Such practice inevitably results in an unconstitutional application of Section 5.

A. *Consequences of Lack of Evidence.* In practice, the effect of Section 5 is that the trial judge directs the jury's attention to evidence falling within the statutory ambit, and informs them that they may draw from it the inference of membership (or participation or knowledge). The phrase "if presented" in the introductory paragraph indicates that if no evidence falling within one or more of the thirteen categories is recorded, then there is no evidence of that sort to call to the jury's attention, and that or those particular categories should not be referred to in the charge.

The trial judge in the present case (and the *Dennis* and *Travis* cases) gave effect to the phrase "if presented" by simply omitting the clause or clauses to which, in his view, no evidence corresponded.[54] But this practice is grossly unfair to the accused, for the result is that evidence thought to support an inference of membership is emphasized to the jury, while a lack of evidence of significant aspects of

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[53] In addition to the charge in the present case and the *Dennis* case, see the charge in the *Travis* case, 269 F. 2d 928, at 941-42.

[54] In the *Travis* and *Dennis* cases the trial judge omitted clauses (1) and (2) from the charge. In the present case he omitted clauses (1), (9) and (10) and added a clause of his own on recruiting—a treatment which only worsened the basic unfairness of underlining the prosecution's evidence and ignoring the gaps therein.

membership—for example, payment of dues—is not even called to its attention, even though such a failure of proof may be quite as (or more) significant on the negative side of the issue as the evidence presented may be on the affirmative side.

Obviously the problem cannot be dealt with simply by including all the Section 5 clauses in the charge regardless of the presence or absence of evidence to fit them. Such a solution would violate the statute's specific language ("if presented"), and would make a bad matter worse, by confusing the jury and suggesting the presence of evidence in categories where in fact there is none.

Accordingly if, as Section 5 envisages, special emphasis is to be given to certain categories of evidence presented against the defendant, fairness requires that comparable emphasis be given to significant gaps in the evidence. If the judge may conclude that evidence has been presented showing that X has spoken in favor of one of the Party's objectives, and may instruct the jury to consider this as evidence of X's membership, then elementary fairness requires that the judge also call to the jury's attention that there is a complete failure of evidence that X has ever paid dues or been listed as a Party member. But none of the district courts have so framed their instructions, and this failure has resulted in the unconstitutional application of Section 5.

B. *Treatment of Remote Evidence.* A far more difficult problem arises in connection with evidence presented by the prosecution which falls within the broad language of one or more of the Section 5 clauses, but the fact is so remote that it cannot reasonably support an inference of membership, or even that it should not be received in evidence at all. Only by disregarding the categorical language of the statute ("the jury . . . shall consider evidence") and giving

broad and discretionary scope to the judge's role ("under instructions from the court") might Section 5 be constitutionally applied.

For if the statute is applied automatically and in accordance with its sweeping language, then much "evidence" would not only be admissible but also sufficient to support the inference of membership, which actually has no probative value and is hopelessly remote from the issue, temporally or logically or both. If this is done, then indeed the apprehensions expressed prior to the act's passage by the Congressmen and journalists quoted above[55] will prove well-founded, and there will be danger of convictions on charges of membership on the most flimsy and remote evidentiary foundations.

Therefore the trial court must rule on evidence offered by the prosecution with due regard to the principle that it should be received only if reasonably probative on the issue of membership. In his charge to the jury, he should make reference to a particular clause of Section 5 only if there is corresponding evidence of sufficient weight to support the inference of membership. Failure to do this, and automatic incorporation of these criteria, will inevitably suggest to the jury that they are invited to find membership on almost any basis. Such an impression cannot be corrected by other parts of the charge, impeccable though they may be.

The charge in the present case plainly fails to meet these requirements. Apart from the changes noted above, it is virtually a "true copy" of Section 5.

C. *Treatment of "Catch-all" Phrases.* Regardless of the nature of the evidence received in any particular case, the indicial clauses of Section 5 should under no circumstances be embodied verbatim in the charge. For these

[55] *Supra*, p. 19.

clauses contain sweeping "catch all" phrases (recapitulated *supra*, p. 20) which are wholly unsuitable for use in charging a jury.

The contents of clause (8) may serve as an example. If it be assumed that evidence is received indicating that the defendant has "communicated" a "directive" of the Communist Party by "semaphore" (unlikely as that may be), and if it be further assumed that the nature of the "directive" and the attendant circumstances are such that an inference of membership might reasonably be drawn, then the trial judge might, in accordance with the statute, call this evidence to the jury's attention and tell them that it might be considered in determining the issue of membership.

But neither on such a record nor any other would there be any justification for incorporating clause (8) in the charge verbatim, for clause (8) covers not only "signal, semaphore, sign" but also "any other form of communication". What evidence does such a phrase denote, and what would be inferred from such an unspecified communication? Plainly it is too vague (like the other catch-all expressions in the other clauses) for any meaningful or proper use in jury instructions.

Accordingly, such sweeping phrases should be eliminated from the charge, regardless of which clause is drawn upon, and regardless of the particular record. In no reported case, however, has this been done. In the present case, the minor discrepancies between the language of Section 5, and of the comparable portions of the charge, were minor and insignificant,[56] and did nothing to prevent the unconstitutional application of Section 5.

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[56]E.g. The word "courier" was omitted from clause (5) and the words "signal, semaphore, sign" from clause (8) of Section 5, as these appeared in clauses (6) and (9) of the charge. All the "catch-all" expressions, however, were retained in the charge.

CONCLUSION

For all the foregoing reasons, the *amici curiae* respectfully join in petitioner's prayer that the decision below be reversed.

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APPENDIX A

SECTION 5 OF THE COMMUNIST CONTROL ACT OF 1954, 50 USC 844

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of

communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

APPENDIX B

THE COURT: Ladies and Gentlemen of the Jury, it now becomes my duty to instruct you as to the law in this case . . .

It is essential to know what the words "membership" and "affiliation" mean. Membership in the Communist Party is a formal relation between an individual and the Communist Party. To constitute membership the individual must desire to belong to the organization and there must be a recognition by the organization that it considers him a member. Furthermore, membership imports adherence to the objectives of the organization. These are questions of fact which you are to determine from all of the evidence in the case, and as with all questions of fact you must find this beyond a reasonable doubt, based on all the evidence.

Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence. In determining whether or not a particular defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant has made himself subject to discipline of the Communist Party in any form whatsoever; has executed orders, plans or directives of any kind of the Communist Party; has acted as an agent, a courier, a messenger, correspondent, organizer or in any other capacity in behalf of the Communist Party; has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the organization; has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication,

order, directives or plans of the Communist Party; has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; has mailed, shipped, circulated, distributed, delivered or in any other way sent or delivered to others materials or propaganda of any kind in behalf of the organization; has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization; has in any other way participated in the activities, planning, actions, objectives or purposes of the organization. These are some of the indicia of Communist Party membership, but you are not limited solely to those I have enumerated.

As sole arbiters of the facts it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendants were members of the Communist Party on the dates alleged in the indictment.

"Affiliation" as used in the indictment is not the same as membership. The word "affiliation" as used in the indictment means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party. A person may be found to be affiliated with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend on him to cooperate with it and to work for its

benefit for an indefinite period upon a fairly permanent basis. Affiliation includes an element of dependability upon which the organization can rely, which, though not equivalent to membership duty, does rest upon a course of conduct that could not be arbitrarily ended without giving a reasonable cause for the charge of a breach of good faith.

Now, whether or not a defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you ladies and gentlemen are to determine from all of the evidence in the case. Affiliation or lack of affiliation with the Communist Party may be established, as I have stated, by direct as well as by circumstantial evidence. . . .